IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 995 130

1. EARLE ROBERT BALL; 2. THE HEIRS OF JOHN S. BECKER, deceased; 3. EUGENE C. CALLAHAN; 4. EVERETT T. CROSSAN; 5. ROBERT J. DEEGAN; 6. CHARLES S. FLIPPEN; 7. JOHN GALVIN; 8. WILLIE A. HOPKINS; 9. WILLIAM E. MASON; 10. CHARLES MONTINI; 11. JOHN T. MOYER; 12. HARRY H. MURRAY; 13. RAYMOND JOHN REILLY; 14. LOUIS R. SHIELS; 15. CHARLES E. WEIR, *Petitioners*,

v.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

SAMUEL I. SHERWOOD,
Attorney for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioners by their attorney Samuel I. Sherwood, pray that a writ of certiorari issue to review the decision of the United States Court of Claims, entered on January 31, 1956, dismissing their petition for retroactive salary, as Veteran Preference Eligibles employed under the United States Civil Service System.

OPINIONS BELOW

The opinion of the court below (App., *infra*, pp. 1a, 9a) is reported in Vol. 137, No. 2 of the Federal Supplement, dated March 19, 1956 at page 740.

JURISDICTION

The opinion and judgment of the court below (infra., pp. 1a to 9a) was entered on January 31, 1956. On April 30, 1956, the time for applying for a writ of certiorari was extended to May 29, 1956, by order of Mr. Chief Justice Warren, (*infra*, p. 9a). It was again extended by the Chief Justice to June 1, 1956 (infra, p. 10a). The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATUTES INVOLVED

The pertinent provisions of the following statutes, are set forth in the Appendix, *infra*, p. 10a: 5 U.S.C. 863; 5 U.S.C. 652(b)(3); 28 U.S.C. 1491; 28 U.S.C. 1346(d)(2); 28 U.S.C. 2501; and 28 U.S.C. 1500.

QUESTIONS PRESENTED

1. Is it mandatory for Federal Civil Service employees who are Veteran Preference Eligibles, to appeal first to the Civil Service Commission from a wrongful reduction in force, in order to recover retroactive salary for the periods of their demotions?

2. Is the Statute of Limitations, 28 U.S.C. 250k, supra, tolled by virtue of 28 U.S.C. 1500 supra, during the pendency of a suit in a U. S. District Court by the petitioners herein, for restoration to the positions from which they were demoted?

STATEMENT

The facts leading up to the filing by the petitioners of their claims before the Court of Claims, are correct as stated in the Opinion of the Court below (App. pp. 1a, 2a, 4a).

The court below stated in its opinion (App. p. 3a) "before a cause of action may be said to have accrued under a statute, it must appear that all statutory requirements have been met." It then went on to state in effect that under 5 U.S.C. 863 (App. p. 10a) the petitioners had to appeal to the Civil Service Commission first in order to meet the statutory requirements. Not doing so, but seeking redress through the U. S. District Court and obtaining the same through a temporary mandatory injunction, it erased their right of recovery of back pay, citing *Goodwin* v. *United States*, 127 C. Cls. 410 (App. pp. 4a, 5a).

The Court of Claims then cited the case of *Carl P. Green* v. *United States*, 124 C. Cls. 186 (App. p. 5a) where Green was restored to duty from a wrongful discharge pursuant to a final mandatory injunction of the District Court. In that case Green recovered his retroactive salary through the Court of Claims on the basis of 5 U.S.C. 652(b)(3) (App. p. 10a). However, the court went on to say that the *Green* case did not help us, inasmuch as in the case of *Gregory* v. *U. S.*, 123 Ct. Cls. 794 (App. p. 5a), the Court of Claims held that section 652 did not apply to demotions but only to discharges.

The fact of the matter is, that the *Gregory* case was one of demotion and not discharge. The court refused recovery on Gregory's position that he was entitled to it under 5 U.S.C. 863, and it further refused the defendant Government's contention that 5 U.S.C. 652(b)(3) restricted recovery to removals and sus-

pensions. The Court stated in that case that 5 U.S.C. 863 was per se and by legislative history a corrective action statute and not a pay recovery one, but that 5 U.S.C. 863 and 5 U.S.C. 652(b)(3) should be interpreted in pari materia, by virtue of their content and their legislative history. Strangely enough however, after interpreting those statutes together in favor of Gregory, the court adjudicated the claim in his favor on the basis of their own previous decisions which preceded 5 U.S.C. 863.

The court below in deciding against us on our contention that 5 U.S.C. 1500 (App. p. 10a) tolled the statute of limitations of 28 U.S.C. 2501, cited *Brunswick Land Corp.* v. *Perkinson*, 153 Va. Rep. 603, 151, S.E. 138, (App. p. 6a) and *Creson* v. *Scott*, 275 S.W. 2d 406 (App. p. 6a). In effect these cases showed that where the same circumstances and parties were involved in two different courts, with the only distinction being that one sounded in tort and the other in contract, that the statute of limitations was not tolled. But neither case fits the circumstances of our case, inasmuch as the petitioners herein could bring action for restoration only in one court and seek recovery of back pay in the other, being statutorily limited.

In the case of *Ylagan* v. *U. S.*, 101 C. Cls. 294, cert. denied 233 U. S. 763 (App. 7a), the circumstances and facts were quite different from the instant case. There Ylagan tried to overcome the statute of limitations by showing his due diligence in turning through the years, from one agency to another, to Congress, to the Postmaster General, to the Civil Service Commission and others, with various claims and complaints, and finally to the District Court, to recover what he deemed was his claim for retroactive salary.

In the case of *Lowery, et al.* v. *U. S.*, 125 C. Cls. 598 (App. 7a, 8a), cited by the court below, the statute of

limitations could not be avoided because, the plaintiffs, firefighters, had elected to sue for money claims in the District Court, hoping to receive more favorable treatment than was accorded the plaintiff in *Conn* v. *U. S.*, 107 C. Cls. 422, cert. denied 332 U.S. 757, cited by the court in its opinion (App. 8a). The *Lowery* case was dismissed in the District Court because it fell within the four corners of the case of *Brauer* v. *U. S.*, 343 U.S. 112, also cited in the court's opinion (App. 8a). Both of these cases were dismissed in the District Court, because of the enactment of the 1951 amendment to 28 U.S.C. 1346(d)(2), which included "employees" as those to be excluded from seeking recovery of money claims for fees and salaries in the District Court.

REASONS FOR GRANTING THE WRIT

On the first question presented, supra, we contend that whether restoration took place as the result of a court order, or from the Civil Service Commission, is immaterial to the accrual of the claims for retroactive salary of the petitioners. The Court of Claims itself in its opinion cited the case of *Carl P. Green* v. *United States*, 124 Ct. Cls., *supra*, where the claim was adjudicated favorably on a Court ordered restoration. Furthermore the *Gregory* v. *United States* case, *supra*, was a reduction in force case, and the claim could have accrued by virtue of the pari materia interpretation by the Court of Claims of 5 U.S.C. 863 and 5 U.S.C. 652(b)(3).

The fact of the matter is, that restoration took place and the words in 5 U.S.C. 652(b)(3) *infra*, which state ". . . after appeal to proper authority, is reinstated . . .", provides the key to show that the statutory requirements are met by the petitioners i.e., they

appealed to the District Court, most certainly, a proper authority.

On the second question presented, supra, we contend that the Statute of Limitations 28 U.S.C. 2501, *infra*, was tolled as the result of petitioners' pendency of suit in the Federal District Court for the Eastern District of Pennsylvania. The statutory requirements for accrual of their claims having been met upon restoration, the statute of limitations was tolled by virtue of 5 U.S.C. 1500, *infra*.

The petitioners had to first effect their restoration in order to meet the statutory requirements for accrual of their claims. They therefore did not "elect" to bring their action in the District Court. They could not seek restorative action in the Court of Claims, because that court does not have that power. They did not seek recovery of their back pay in the District Court, because 28 U.S.C. 1346(d)(2), effectively barred them from that forum for that purpose.

In effect the Court of Claims' decision in the instant case does not follow the law as laid down in *Bruner* v. *United States*, 343 U.S. 112 (App. 8a). In that case, a wage claim was dismissed, by the District Court as the result of the passage of the amendment to 28 U.S.C. 1346(d)(2) on October 31, 1951 (ch. 655, Sec. 50(b), 65 Stat. 727). That amendment added the word "employees" to the statute. The Court of Claims in the instant case, in stating that petitioners herein "elected" to file their action in the District Court, is in effect stating that the District Court had jurisdiction over wage claims, when, in fact the District Court, as per the Bruner decision, did not.

Furthermore, the petitioners could not have brought a wage claim to the District Court in 1948, because

they were barred as "officers", from recovery in that court, by virtue of the enactment of 28 U.S.C. 1346(d)(2) on June 25, 1948, ch. 646, Sec. 1, 62 Stat. 933. That petitioners are officers, is amply supported by the following: *Jentry* v. *U. S.*, D.C. Cal. 1947, 73 F. Supp. 899, where a civilian seaman was determined to be an officer. *Kennedy* v. *U. S.*, D.C. Tax 1944, 54 F. Supp. 446, affirmed 146 F. 2d 26, where a junior instructor of mathematics, was found to be an officer. *Callahan* v. *U. S.*, 1941, 122 F. 2d 216, 74 U.S. App. D.C. 281, a customs service employee.

The law under 28 U.S.C. 1500, is clear and unequivocal. In the case of *Maguire Industries* v. *United States*, Ct. Cls. 1949, 86 F. Supp. 905, the court there said, speaking of 28 U.S.C. 1500, "Renegotiation proceeding of government contracts before the tax courts are essentially 'judicial proceedings', and come within the spirit of this section declaring that the Court of Claims is without jurisdiction of any claim for which plaintiff or his assignee has pending in any other court any suit or process against the United States."

In the case of *British American Tobacco Co.* v. *The United States*, 1939, 89 Ct. Cls. 438, cert. denied 60 S. Ct. 974, 310 U.S. 627, 84 L. Ed. 1398, the interpretation of 28 U.S.C. 1500, is made pellucidly clear, when the court stated, "Where the only distinction between two suits, one instituted in the U. S. District Court against an agent of the United States and the other instituted in the Court of Claims against the United States is that the action in the District Court was made to sound in tort and the action in the Court of Claims was alleged on contract, the facts existing and operating in both cases being the same, the Court of Claims

is without jurisdiction, the case in the District Court having been prosecuted to a conclusion."

See also, *Joyce* v. *U. S.*, Ct. Cls. 1943, 48 F. Supp. 526, 98 Ct. Cls. 427:

"Dismissal of suit against United States to recover income taxes paid was required because of pendency of another suit on the same cause of action against collector of internal revenue acting under authority of United States."

"Purpose of this section was to prohibit the filing and prosecution of the same claims against the U. S. in two courts at the same time." *Frantz Equipment Co.* v. *U. S.*, 98 F. Supp. 579, 120 Ct. Cls. 312.

"Where plaintiff, when it filed its petition commencing suit in Court of Claims had pending in a federal District Court a suit against a former collector of internal revenue based on same claim and such former collector was, at time cause of action arose acting under authority of the U. S. in respect thereto, petition and action in Court of Claims must be dismissed." *N. J. Worsted Mills* v. *U. S.*, 1935, 9 F. Supp. 665, 80 Ct. Cls. 640.

There was no election by the petitioners in bringing their action to the District Court, because it was there that they could effect their actual restoration to the jobs from which they had been demoted. The Court of Claims does not have that authority. However, in seeking actual restoration, they could not, while their suit was pending in the District Court, seek recovery of their claims in the Court of Claims.

For all of the foregoing reasons, petitioners pray that a writ of certiorari, issue from this Court.

SAMUEL I. SHERWOOD,
Attorney for Petitioners.

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 149-55

(Decided January 31, 1956)

EARLE ROBERT BALL, THE HEIRS OF JOHN S. BECKER, DECEASED: EUGENE C. CALLAHAN, EVERETT T. CROSSAN, ROBERT J. DEEGAN, CHARLES S. FLIPPEN, JOHN GALVIN, WILLIE A. HOPKINS, WILLIAM E. MASON, CHARLES MONTINI, JOHN T. MOYER, HARRY J. MURRAY, RAYMOND JOHN REILLY, LOUIS R. SHIELDS, CHARLES E. WEIR

v.

THE UNITED STATES

Mr. Samuel I. Sherwood for the plaintiffs.

Mr. LeRoy Southmayd, Jr., with whom was *Mr. Assistant Attorney General Warren E. Burger*, for the defendant.

ON DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' PETITION

LARAMORE, *Judge*, delivered the opinion of the court:

Plaintiffs, all honorably discharged veterans of the Armed Forces of the United States entitled to rights conferred by the Veterans' Preference Act of 1944, 58 Stat. 378, 390, as amended, 61 Stat. 723, are employed by the Department of the Navy at the Philadelphia Naval Shipyard.

On January 5, 1948, all plaintiffs, except Eugene C. Callahan, were reduced in rank, grade, and salary from their leadingman positions to various journeyman positions. On November 1, 1948, all plaintiffs, except Callahan, were re-

stored to their former ranks, grades, and salaries pursuant to a temporary mandatory injunction issued by the U. S. District Court for the Eastern District of Pennsylvania. The District Court, on October 25, 1948, had held that they had been "unlawfully reduced" in grade. Plaintiff Callahan was reduced in grade on September 8, 1947, and was restored by order of the same District Court on July 14, 1948, for the same reason.

Plaintiffs seek by their petition filed April 8, 1955, to recover pay allegedly due them from the United States as a result of their alleged illegal reduction in grade.

On April 21, 1955, defendant filed a motion for an order dismissing the petition on the ground that this court does not have jurisdiction of the claims stated therein, since it appears on the face of the petition that the claims accrued more than six years prior to the filing of the petition and are accordingly barred by the statute of limitations, 28 U. S. C. § 2501, which provides in part:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, * * * within six years after such claim first accrues.

In order to determine whether or not a claim is barred by the running of the applicable statute of limitations, it is first necessary to decide when the cause of action on the claim first accrued. Plaintiffs contend that the cause of action sued on did not accrue until final disposition of their cases in the U. S. District Court in 1954. Plaintiffs also contend that in any event the statute of limitations must have been tolled during the pendency of the suits in the District Court because until that time plaintiffs were denied access to the Court of Claims by virtue of 28 U. S. C. § 1500,[1] citing *Oerlikon Machine Tool Works, et*

[1] "The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States."

al. v. United States, 121 C. Cls. 616. Defendant contends that the cause of action sued on herein accrued in the case of each plaintiff on the date of the wrongful demotion which, admittedly, occurred more than six years prior to the filing of the petition.

A cause of action arises from an invasion of a right or a violation of a duty or obligation. *Travelers Fire Ins. Co. v. Rainey-Davis Mercantile Co., etc.*, 173 F. 2d 844. A cause of action accrues for purposes of the statute of limitations when a suit may first be legally instituted thereon, *i.e.*, when all the events have occurred which fix the liability of the United States to a claimant and which entitle the claimant to sue thereon. *Sese v. United States*, 125 C. Cls. 526; *Group v. United States*, 125 C. Cls. 135; *Reliance Motors Inc. v. United States*, 112 C. Cls. 324. Plaintiffs herein allege that they are entitled to recover under the provisos of the Veterans' Preference Act of June 27, 1944, 58 Stat. 390, as amended by the Act of August 4, 1947, 61 Stat. 723, 5 U. S. C. (Supp. V) § 863. Before a cause of action may be said to have accrued under a statute, it must appear that all the statutory requirements have been met. *Sanderson v. Postal Life Ins. Co.*, 72 F. 2d 894, 897. The Act of June 27, 1944, prior to the 1947 amendment, provided that no preference eligible should be reduced in rank or compensation except for such cause as would promote the efficiency of the service; that the veteran should have the right to appeal in person to the Civil Service Commission from an adverse decision of the administrative officer; and that the Civil Service Commission should submit its findings and recommendations to the proper administrative officer. In the case of *Stringer v. United States*, 117 C. Cls. 30, we held that failure of the Government to comply with the procedural rights accorded the plaintiff under that statute, gave rise to a cause of action for pay lost on account of wrongful demotion from the date of such demotion to the date of judgment, *Stringer* not having been reinstated to

his proper rank. Although the plaintiffs herein have not alleged in what manner their reductions in grade were in violation of the 1944 Veterans' Preference Act, they have alleged that the demotions were "illegal" and for the purposes of this motion we will assume that the provisions of the act were not complied with. Accordingly, plaintiffs have stated a cause of action within the meaning of the 1944 act. From all that appears, however, that cause of action was complete when the demotions took place, and plaintiffs were entitled to sue thereon at that time. Plaintiffs, however, did not elect to bring suit for lost pay at that time, but commenced action in the District Court against individual Government officials to secure reinstatement to their proper grades, and such reinstatements were finally ordered and made pursuant to a temporary mandatory injunction of the District Court as noted above. The Government officials appealed from the District Court order and in the case of *Hopkins, et al.* v. *Wallin, et al.*, 179 F. 2d 136 (1949), the temporary injunction of the District Court was vacated and the cause remanded to the District Court for further proceedings. In 1954 the cause was finally dismissed in the District Court for lack of prosecution.

It is plaintiffs' position that their cause of action under the Veterans' Preference Act, *supra*, as amended by the Act of August 4, 1947, did not accrue until the reinstatement proceedings in the District Court were finally terminated in 1954. The 1947 amendment to the Veterans' Preference Act of 1944 contains the following additional provision:

> * * * and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: * * *

In *Goodwin* v. *United States*, 127 C. Cls. 449, we held that the mandatory recommendation of the Civil Service Commission to reinstate in the case of a veteran demoted in

violation of the provisions of the Veterans' Preference Act, *supra*, created a statutory claim against the employing agency for the back pay lost during the period of demotion; that the claim under that statutory provision arose when the mandatory recommendation of the Commission was issued; and that suit brought two months thereafter was timely, although more than six years had elapsed since the actual demotion took place. It does not appear that the instant plaintiffs have brought themselves within the ruling in the *Goodwin* case, since the order relied on by them is an order of the District Court rather than of the Civil Service Commission, as provided in the 1947 amendment to the Veterans' Preference Act, *supra*. Accordingly, no new cause of action accrued by virtue of the District Court order whenever it was final.

In the case of *Carl P. Green* v. *United States*, 124 C. Cls. 186, we held that plaintiff's right of action under the Act of June 10, 1948, 62 Stat. 354 (amending the Lloyd-La Follette Act of August 12, 1912), 28 U. S. C. § 652 (b) (3), for pay lost through wrongful *discharge*, accrued upon his restoration to duty pursuant to a *final* mandatory injunction of the District Court, noting that the time to appeal therefrom had expired. This case does not help plaintiffs herein, however, since in *Gregory* v. *United States*, 123 C. Cls. 794, we held that section 652 of the 1948 act did not apply to demotions but only to discharges.

We have held that failure to pursue administrative remedies not required by the statute does not prevent a cause of action from accruing thereunder, *Cuiffo* v. *United States*, 131 C. Cls. 60. We have also held that the pendency of administrative proceedings not required by the statute under which suit is brought does not serve to toll the statute of limitations. *Gray* v. *United States*, 124 C. Cls. 313; *McCormick* v. *United States*, 124 C. Cls. 111; *Thomas* v. *United States*, 125 C. Cls. 76. Had the instant plaintiffs not been reinstated in their proper grades by order of

the District Court, such circumstance would not have prevented their causes of action from accruing under the 1944 Veterans' Preference Act (before amendment) on the date of their illegal demotions. *Stringer* v. *United States*, *supra*.

But plaintiffs urge that because of the operation of section 1500 of the Judicial Code (28 U. S. C. § 1500), they were absolutely barred from bringing suit in this court, and that as long as access to the court was thus denied them, the statute of limitations applicable to suits in the Court of Claims is tolled.

Assuming that section 1500 would have prevented plaintiffs from maintaining their suits against the Government for back salary in the Court of Claims while their suits for specific relief against individual Government officials were pending in the Federal District Court, a point which we do not decide, we do not think that the statute of limitations was tolled while plaintiffs' suits in the District Court were still pending. Prior to the commencement of the District Court suits against individual Government officials, plaintiffs had a completely accrued cause of action for pay against the Government itself on which they might have then brought suit in the Court of Claims. Plaintiffs' right to recover on the salary claims was in no way dependent upon a final judgment in reinstatement proceeding. In *Creson* v. *Scott*, 275 S. W. 2d 406, the Kentucky court held that where plaintiff's claim was in no way dependent upon a judgment in a suit pending in another court, the pendency of that other litigation did not serve to toll the statute of limitations. In *Brunswick Land Corp.* v. *Perkinson*, 153 Va. Rep. 603, 151 S. E. 138, the Virginia court held that the pendency of an independent proceeding between the parties involving a cognate question did not serve to frustrate the plea of the statute of limitations after the lapse of the prescribed period. In that case the plaintiff had waited more than the applicable statutory period to file a suit for trespass to land. In re-

sponse to the defense of the statute of limitations, plaintiff urged that the statute was tolled while he was seeking judgment in another proceeding against the same party to determine the actual boundary between their lands and to have the strip on which the alleged trespass occurred awarded to plaintiff. The court held that while the suit to try title or right of possession was related to the suit for damages for trespass, the two suits concerned distinct and independent causes of action, and the pendency of one did not serve to toll the statute of limitations on the other. See also *In re H. L. Herbert & Co.* (C. C. A. 2d 1919), 262 F. 682. In *Flagan* v. *United States*, 101 C. Cls. 294, cert. denied, 233 U. S. 763, plaintiff sued for pay for a period of wrongful demotion and also for a subsequent period of wrongful removal from his position with the Government. The petition in the Court of Claims was filed more than six years from the alleged illegal acts of the Government, but within two years of a final order of the District Court dismissing proceedings brought therein by plaintiff against a Government official to secure reinstatement. Plaintiff contended that the statute of limitations did not commence to run on his suit in the Court of Claims until final action had been taken in his District Court proceedings. The Court rejected this contention and dismissed the petition holding that the statute of limitations was not tolled by the failure of other supposed remedies. In *Lowry, et al.* v. *United States*, 125 C. Cls. 598, plaintiffs brought suit for overtime pay alleged to be due them by reason of their employment by the War Department as civilian firefighters during the period between December 1, 1942, and December 31, 1944. The petition was filed in this court on September 29, 1952. In response to defendant's plea of the statute of limitations, plaintiffs urged that the statute of limitations did not commence to run on their claims until suits on the very same pay claims pending in the Federal District Court were dismissed following the decision of the Supreme Court in *Brunez* v. *United States*, 343 U. S.

112. The Court of Claims dismissed the petitions, noting that at the time plaintiffs had filed their petitions in the District Court, that court and the Court of Claims had concurrent jurisdiction in pay cases of Government "employees" and that plaintiffs had apparently *elected* to bring suit in the District Court in the hope of more favorable treatment on their claims than they would have received in the Court of Claims because of this court's decision in the case of *Coan* v. *United States*, 107 C. Cls. 422, cert. denied, 332 U. S. 757. [The court held that the statute of limitations was not tolled, nor did the 1951 statute (Act of June 25, 1948, 62 Stat. 640), depriving the District Court of jurisdiction over plaintiff's cause of action, serve to create a new period of limitations.] (Sentence in brackets deleted by order of the Court of Claims March 7, 1956.)

Plaintiffs' reliance on the cases holding that a state of war which closes the court to a particular plaintiff tolls the statute of limitations, while access to the court is thus denied plaintiff, is misplaced. In the case of *Marcos* v. *United States*, 122 C. Cls. 641, the court discussed at some length the reasons why the statute of limitations is tolled by war, and none of those reasons exist in a case like this where plaintiffs might have brought suit for pay in the Court of Claims when their causes of action accrued, but elected to seek reinstatement in the District Court by suits against the Government officials responsible for their demotion.

We conclude that plaintiffs have stated but one cause of action which accrued and might have been sued upon in this court at the time of the demotions complained of. No additional cause of action accrued to these plaintiffs by virtue of their subsequent reinstatement, and the pendency of their District Court proceedings in the reinstatement matter did not toll the running of the statute of limitations on their causes of action for pay in the Court of

Claims, despite the fact that the pendency of such District Court proceedings might have deprived this court of jurisdiction of the pay claims. Since plaintiffs' petition was not timely filed, it must be dismissed.

It is so ordered.

MADDEN, *Judge*; WHITAKER, *Judge*; LITTLETON, *Judge*; and JONES, *Chief Judge*, concur.

SUPREME COURT OF THE UNITED STATES

No.

October Term, 1955

EARLE ROBERT BALL, *et al.*

v.

THE UNITED STATES

Order Extending Time To File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 29th, 1956, provided the time has not expired.

/s/ EARL WARREN
Chief Justice of the United States.

Dated this 30th
day of April, 1956

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No.

EARLE ROBERT BALL, ET AL., *Petitioners*

vs.

THE UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s).

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 1st, 1956.

/s EARL WARREN
Chief Justice of the United States.

Dated this 29th day of May, 1956

STATUTES INVOLVED

5 U.S.C. 863:

> "No permanent or indefinite preference eligible . . . employed in the civil service . . . shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, . . . except for such cause as will promote the efficiency of the service . . .; such preference eligible . . . shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer . . .".

5 U.S.C. 652(b)(3):

> "Any person removed or suspended without pay in a reduction in force, who, after appeal to proper authority, is reinstated . . . shall be paid compensation at

the rate received on the date of such removal . . . for the period for which he received no compensation . . ."

28 U.S.C. 1491:

". . . The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States, that is, . . . (2) Founded upon any act of Congress, or (3) Founded upon any regulation of an executive department . . . ".

28 U.S.C. 1346(d)(2):

"The District Courts shall not have jurisdiction under this section of any civil action to recover fees, salary or compensation for official services of officers or employees of the United States."

28 U.S.C. 2501:

"Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed . . . within six years after such claim first accrues."

28 U.S.C. 1500:

"The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff . . . has pending in any other court any suit . . . against the United States or any person who, . . . was, in respect thereto acting or professing to act, directly or indirectly under the authority of the United States."

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No. 126

In the Supreme Court of the United States

October Term, 1978

RAFAEL DOMINGO RAEL, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 130

EARLE ROBERT BALL, ET AL.

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims dismissing the petition (Pet. App. 1a-9a) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered January 31, 1956 (Pet. App. 1a). The petition for a writ of certiorari, pursuant to orders of the Chief Justice extending time for filing, was filed June 1, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether petitioners' claims for loss of salary incurred by reason of alleged illegal demotions, which admittedly took place more than six years prior to the

date of the filing of their suits, are barred by the six year statute of limitations applicable to suits in the Court of Claims.

STATUTES INVOLVED

The pertinent provisions of the applicable statutes are set forth in the Appendix, *infra*, pp. 7-8.

STATEMENT

Petitioners, honorably discharged veterans of the armed forces of the United States, are employed by the Department of the Navy in the Philadelphia Naval Shipyard (Pet. App. 1a). On January 5, 1948, all plaintiffs, except Eugene C. Callahan, were reduced in rank, grade, and salary from their leadingman positions to various journeyman positions (Pet. App. 1a). On November 1, 1948, all plaintiffs, except Callahan, were restored to their former ranks, grades, and salaries pursuant to a temporary mandatory injunction issued by the United States District Court for the Eastern District of Pennsylvania, which held that petitioners had been "unlawfully reduced" in grade (Pet. App. 1a-2a). Plaintiff Callahan was reduced in grade on September 8, 1947, and was restored by order of the same District Court on July 14, 1948, for the same reason (Pet. App. 2a). On appeal the temporary injunctions were vacated and the causes remanded to the District Court for further proceedings, *Hopkins* v. *Wallin*, 179 F. 2d 136 (C.A.3), and in 1954 the causes were finally dismissed in the District Court for lack of prosecution (Pet. App. 4a).

On April 8, 1955, petitioners filed suit in the Court of Claims to recover pay allegedly due them from the United States as a result of their alleged illegal reduction in grade (Pet. App. 2a). The Court of Claims on January 31, 1956, granted the Government's motion to

dismiss the petition as not timely filed (Pet. App. 1a-9a). Pointing out that 28 U.S.C. 2501 fixed a six-year limitation on suit once a claim has accrued, the court found that, in accordance with recognized principles applicable to statutes of limitations, petitioners' causes of action had accrued on the dates of their alleged illegal demotions, and that their suit, filed more than six years after those dates, was barred by the statute (Pet. App. 2a-6a). The court held further that the statute of limitations applicable to suits in the Court of Claims was not tolled by the operation of 28 U.S.C. 1500, assuming *arguendo* that this section prevented petitioners from maintaining suit in the Court of Claims while their District Court action was pending (Pet. App. 6a-9a).

ARGUMENT

The only question before the Court of Claims was whether petitioners filed their suit within the time provided by statute. The Court of Claims, in a carefully documented opinion, found that they did not. We submit that this holding is clearly correct, and that it is in full accord with decisions of both this Court and the Court of Claims. Accordingly, review by this Court in unwarranted.

The statute of limitations applicable to suits in the Court of Claims provides (28 U.S.C. 2501) that all such claims "shall be barred unless the petition thereon is filed * * * within six years after such claim first accrues." Petitioners were reduced in grade on January 5, 1948 (except for petitioner Callahan, who was reduced in grade on September 8, 1947), more than six years prior to April 8, 1955, the date of the institution of their suit; and the Court of Claims, holding that their causes of action, if any, had accrued on the dates of

their allegedly unlawful reduction in grade, therefore properly dismissed the complaint as untimely.

a. It is well established that petitioners' causes of action under the Veterans' Preference Act, 5 U.S.C. 863, *infra*, p. 7, "accrued on the dates when the alleged wrongful reductions became effective. If wrongful, the liability of the defendant became fixed on those dates and the plaintiffs were then entitled to institute suits." *Group* v. *United States*, 125 C. Cls. 135, 137. It is from those dates that they would be entitled to recover lost pay (*Stringer* v. *United States*, 117 C. Cls. 30) and, in the absence of "subsequent actions * * * taken by defendant which would give rise to a new cause of action" (*Group* v. *United States*, *supra*), it is from those dates that the limitation times begin to run. Here no such subsequent actions are alleged and accordingly it is plain that petitioners failed to institute timely suit.

b. There is no merit in petitioners' contention that their causes of action under the Veterans' Preference Act did not accrue until the reinstatement proceedings in the District Court were finally terminated for lack of prosecution in 1954. Although, by statute, a mandatory recommendation of reinstatement by the Civil Service Commission has the effect of creating a new cause of action for back pay (*Goodwin* v. *United States*, 127 C. Cls. 417; cf. *Upton* v. *United States*, C. Cls. No. 568-52, decided June 7, 1955), there is no statutory basis for according such effect to litigation in the courts, especially when it is unsuccessful.[1] As the decision

[1] Even if, as petitioners appear to contend (Pet. 5-6), the short-lived temporary injunctions of July 14 and November 1, 1948, gave rise to a cause of action, they are of no consequence here as they were granted more than six years prior to the institution of this suit.

below points out (Pet. App. 5a-6a), the Court of Claims has held, in cases involving alleged violations of veterans' rights under the Veterans' Preference Act, that a cause of action is not prevented from accruing either by the failure to pursue administrative remedies provided by the statute (*Griffo* v. *United States*, 131 C. Cls. 60) or by the pendency of such proceedings (*Gray* v. *United States*, 124 C. Cls. 333; *McCormick* v. *United States*, 124 C. Cls. 111; *Thomas* v. *United States*, 125 C. Cls. 76). Likewise, the mere pendency of the District Court suit obviously did not prevent the accrual of petitioners' causes of action as of the dates of their demotions.

c. Petitioners argue, however, that even if their causes of action did accrue at that time, the statute of limitations was tolled by operation of 28 U.S.C. 1500. Assuming without deciding (Pet. App. 6a) that this section of the Judicial Code (set forth *infra*, p. 8) would have prevented petitioners from maintaining their suit for back pay while the District Court action was pending, the Court of Claims held that nevertheless the statute of limitations was not thereby tolled (Pet. App. 6a).

It is well established that the mere fact that petitioners had claims pending in another tribunal is no ground for tolling the statute of limitations. *Vlagan* v. *United States*, 101 C. Cls. 294, certiorari denied, 323 U.S. 673; *Lowry* v. *United States*, 125 C. Cls. 598. The statute creating the six year limitation on suit in the Court of Claims (28 U.S.C. 2501, *infra*, p. 8) provides for the tolling of the limitation period in only two specified instances: where the claimant is "under legal disability or beyond the seas at the time the claim accrues * * *." This phrase is simply an adoption of the traditional exemptions for such classes as "married

women, minors, idiots, lunatics, insane persons, and persons beyond the seas * * *" (*Marcos* v. *United States*, 122 C. Cls. 641, 649), as spelled out in the prior limitations statute, former section 262 of Title 28; it plainly does not include petitioners.[2]

Nor can petitioners contend that the operation of 28 U.S.C. 1500 (*infra*, p. 8) prevented the timely prosecution of their salary claims. At any time during the six-year period petitioners could have dismissed their District Court proceeding and brought their suit in the Court of Claims.[3]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE, 1956.

[2] Moreover, since this clause expressly provides that the disability must exist at the time the claim accrues, it plainly cannot apply to petitioners, whose causes of action accrued prior to the commencement of their District Court suits (*supra*, p. 4).

[3] It should be noted that here there is and can be no allegation that the courts were closed to petitioners by war. Cf. *Hanger* v. *Abbott*, 6 Wall. 532, 539.

APPENDIX

5 U.S.C. 863 provides in pertinent part:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision * * *.

5 U.S.C. 652(b)(3) provides:

> Any person removed or suspended without pay in a reduction in force who, after an appeal to proper authority, is reinstated or restored to duty on the ground that such removal or suspension was unjustified or unwarranted shall be paid compen-

sation at the rate received on the date of such removal or suspension, for the period for which he received no compensation with respect to the position from which he was removed or suspended, less any amounts earned by him through other employment during such period, and shall for all purposes except the accumulation of leave be deemed to have rendered service during such period. A decision with respect to any appeal to proper authority under this paragraph shall be made at the earliest practicable date.

28 U.S.C. 1500 provides:

The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

28 U.S.C. 2501 provides in pertinent part:

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues.

* * * * *

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

* * * * *

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